

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 07 November 2005

Case No. 2003-BLA-6105

In the Matter of:
DIXIE LESLIE, Widow of
BILLIE LEE LESLIE,
Claimant,

v.

RATLIFF COAL SALES, INC.,
Employer,

and,

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Respondent.

APPEARANCES:
William Lawrence Roberts, Esq.
On behalf of Claimant

Paul E. Jones, Esq.
On behalf of Respondent

BEFORE: THOMAS F. PHALEN, JR.
Administrative Law Judge

DECISION AND ORDER – DENIAL OF BENEFITS

This is a decision and order arising out of a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901-962, ("the Act") and the regulations thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.¹

¹ The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80, 045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). On August 9, 2001, the United States District Court for the District of Columbia issued a Memorandum and Order upholding the validity of the new regulations. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

On June 17, 2003, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a hearing. (DX 27).² A formal hearing on this matter was conducted on October 27, 2004, in Pikeville, Kentucky by the undersigned Administrative Law Judge. All parties were afforded the opportunity to call and to examine and cross examine witnesses, and to present evidence, as provided in the Act and the above referenced regulations.

ISSUES³

The issues in this case are:

1. Whether the Miner has pneumoconiosis as defined by the Act;
2. Whether the Miner's pneumoconiosis arose out of coal mine employment; and
3. Whether the Miner's death was due to pneumoconiosis;

(DX 27; ALJ 2).

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

Billie Lee Leslie ("Miner") was born on November 9, 1937, and died on January 31, 2002, at the age of 64 years. (DX 3, 6). He married Dixie Lea (Hinsley) Lesley ("Claimant") on August 5, 1960, and they remained married for 41 years, until Miner's death. (DX 6, 9; Tr. 10). Also, Claimant has not remarried. (Tr. 13). Finally, Miner and Claimant did not have any children, nor was there anyone dependent on Miner at the time of his death. (DX 3). I find that Claimant is an eligible surviving spouse of Miner.

At the deposition, Claimant confirmed that Miner worked for Ratliff Coal Sales for approximately 12 years, quitting in 1986. (DX 6). Miner last coal mine work was as a general laborer, where he dropped cars, loaded cars, cleaned up around and maintained the tippie, operated heavy equipment, and served as a mechanic. (DX 1, 5). Miner's employment history

² In this Decision, "DX" refers to the Director's Exhibits, "EX" refers to the Employer's Exhibits, "CX" refers to the Claimant's Exhibits, and "Tr." refers to the official transcript of this proceeding

³ The parties withdrew as uncontested whether the named employer is the responsible operator, and stipulated to 26 years of coal mine employment. While these actions did not take place on the record, the changes were marked on a copy of DX 27 and initialed by the parties. I have designated this updated issues page ALJ 2. Also, total disability was marked on the designation form, but is not an issue in this survivor's claim. §718.205(c).

form stated that this work required him to sit four 4 ½ hours per day, stand for 4 ½ hours per day, and lift 40 to 50 pounds 40 to 50 times per day. (DX 1, 5).

Procedural History

Miner filed his application for benefits on July 1, 1998. (DX 1). The undersigned Administrative Law Judge issued a decision and order awarding benefits on January 18, 2000. Employer did not appeal this award.

Miner died on January 31, 2002. Claimant filed a claim for survivor benefits on March 4, 2002. (DX 3). On March 10, 2003, the District Director, OWCP issued a proposed decision and order - award of benefits. (DX 23). Employer requested a formal hearing. (DX 24). On June 17, 2003, her claim was transferred to the Office of the Administrative Law Judges for a formal hearing, which was conducted on October 27, 2004 by the undersigned. (DX 27).

Length of Coal Mine Employment

The Social Security Earnings records and the other evidence of record establishes, and I find, that Miner was a coal miner within the meaning of § 402(d) of the Act and § 725.202 of the regulations. The parties stipulated that Miner engaged in at least 26 years of coal mine employment. (ALJ 2). Since the parties' stipulation is supported by the record, (DX 8-9). I find that Miner engaged in at least 26 years of coal mine employment.

Claimant's last employment was in the Commonwealth of Kentucky (DX 1) ; therefore, the law of the Sixth Circuit is controlling.⁴

Responsible Operator

Liability under the Act is assessed against the most recent operator which meets the requirements of §§ 725.494 and 725.495. The District Director identified Ratliff Coal Sales, Inc. as the putative responsible operator because it was the last operator to employ Claimant for a year. (DX 18, 23). In the decision and order dated January 18, 2000, in which the undersigned determined that Miner had satisfied the elements of entitlement, I determined that Ratliff Coal Sales, Inc., was the correct responsible operator. (DX 1). This decision was never appealed, nor has Employer submitted any additional evidence concerning this issue. Therefore, upon review of the record, I find that Ratliff Coal Sales, Inc., is properly designated as the responsible operator in this case.

MEDICAL EVIDENCE

Section 718.101(b) requires any clinical test or examination to be in substantial compliance with the applicable standard in order to constitute evidence of the fact for which it is proffered. *See* §§ 718.102 - 718.107. The claimant and responsible operator are entitled to

⁴ Appellate jurisdiction with a federal circuit court of appeals lies in the circuit where the miner last engaged in coal mine employment, regardless of the location of the responsible operator. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200 (1989)(en banc).

submit, in support of their affirmative cases, no more than two chest x-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two blood gas studies, no more than one report of each biopsy, and no more than two medical reports. §§ 725.414(a)(2)(i) and (3)(i). Any chest x-ray interpretations, pulmonary function studies, blood gas studies, biopsy report, and physician's opinions that appear in a medical report must each be admissible under § 725.414(a)(2)(i) and (3)(i) or § 725.414(a)(4). §§ 725.414(a)(2)(i) and (3)(i). Each party shall also be entitled to submit, in rebuttal of the case presented by the opposing party, no more than one physician's interpretation of each chest x-ray, pulmonary function test, arterial blood gas study, or biopsy submitted, as appropriate, under paragraphs (a)(2)(i), (a)(3)(i), or (a)(3)(iii). §§ 725.414(a)(2)(ii), (a)(3)(ii), and (a)(3)(iii). Notwithstanding the limitations of §§ 725.414(a)(2) or (a)(3), any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence. § 725.414(a)(4). The results of the complete pulmonary examination shall not be counted as evidence submitted by the miner under § 725.414. § 725.406(b).

Claimant completed a Black Lung Benefits Act Evidence Summary Form. (CX 4). While Claimant designated an unspecified x-ray by Dr. Sundaram⁵, and two medical reports by Dr. King denoted as C-1 and C-2, she also included an exhibit list that listed the following evidence: A death certificate signed by Dr. King on February 5, 2002 (DX 10); treatment records from Dr. King; medical reports from Dr. King dated April 30, 2002, January 14, 2004, and October 4, 2004; a medical report by Dr. Sundaram dated July 29, 2002; and a medical report by Dr. Baker dated September 7, 2004.

I find that the treatment notes and the death certificate are admissible, and will be considered in the adjudication of this claim.⁶ However, under the limitations of §725.414 (a)(2)(i), Claimant is only entitled to submit two medical reports without a showing of "good cause" to exceed the limitations. As Claimant has not provided any reasons for consideration of additional reports, and as her exhibit list includes five narrative reports, I find inclusion of all this evidence is not permissible under the regulations. Therefore, as designated by Claimant's Black Lung Benefits Act Evidence Summary Form, only Dr. King's reports dated January 14, 2004 (CX 2), and October 4, 2004 (CX 1), will be considered in the adjudication of this Claim. Thus, Dr. King's April 30, 2002 report, Dr. Sundaram's July 29, 2002 report, and Dr. Baker's September 7, 2004 report are excluded from consideration.

Employer completed a Black Lung Benefits Act Evidence Summary Form. (EX 4). Employer designated Dr. Caffrey's medical report dated June 25, 2002, his supplementary report

⁵ The summary form does not include a specific date or exhibit designation for Dr. Sundaram's x-ray interpretation. In addition, while Director's Exhibit 15 is a report by Dr. Sundaram, it does not include an x-ray interpretation form, but notes that he referenced a film that is on file with the Pikeville Hospital Radiology Department. Therefore, I find that while Claimant has designated an x-ray that is admissible within the limitations, since she has not clearly identified the date or location of the report, I am unable to consider this evidence.

⁶ Director's Exhibit 11 includes a number of bona fide medical treatment entries which are clearly admissible under the regulations. But it also includes a February 7, 1997 report from Dr. Myers; a February 26, 1997 report by Dr. Fritzhand; a July 15, 1998 report by Dr. Younes; and an August 18, 1999 report by Dr. King. I find that the format and content of these entries are consistent with submissions from previous state and federal black lung adjudications, and are not treatment records. Therefore, while the majority of the 1988 to 2001 entries are admissible as treatment records, these four black lung reports included in DX 11 are not admissible without a showing of "good cause."

dated August 1, 2002, and his deposition taken August 21, 2002. (DX 17). Employer also designated Dr. Branscomb's November 17, 2003 report, (EX 1), along with his supplemental reports dated November 26, 2003 and February 23, 2004. (EX 2-3). Employer's evidence complies with the requisite quality standards of §§ 718.102-107 and the limitations of § 725-414 (a)(3). Therefore, I admit the evidence Employer designated in its summary form.

X-RAYS

Exhibit	Date of X-ray	Date of Reading	Physician / Credentials	Interpretation
DX 11	11/1/96	11/17/96	Powell, B-reader ⁷	1/0 pp
DX 11	12/2/96	12/18/96	Myers	1/1 qt

PULMONARY FUNCTION TESTS

Exhibit/ Date	Co-op./ Undst./ Tracings	Age/ Height	FEV₁	FVC	MVV	FEV₁/ FVC	Qualifying Results
DX 11 5/4/88	Good/ Good/ Yes	50 63"	1.85 1.43*	3.23 2.86*	64 53*	57 50*	No Yes*

ARTERIAL BLOOD GAS STUDIES

Exhibit	Date	pCO₂*	pO₂*	Qualifying
DX 11	5/3/88	36.9	79.6	No
DX 11	3/1/98	35.9	55.4	Yes

Hospital and Treatment Records⁸

The record contains treatment notes from Pikeville Methodist Hospital of Kentucky. (DX 11). These records span from May 1988 through September 5, 2001, and the entries pertinent to this claim for benefits are reproduced below in chronological order.

⁷ A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health and Human Services. This is a matter of public record at HHS National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. (42 C.F.R. § 37.51) Consequently, greater weight is given to a diagnosis by a "B" Reader. See *Blackburn v. Director, OWCP*, 2 B.L.R. 1-153 (1979).

⁸ This treatment record includes several x-ray interpretations. For many of these interpretations, there is no evidence in the record as to the x-ray reading credentials of the providing physicians. Also, several of these interpretations were related to the treatment of Claimant's condition, and not for the purpose of determining the existence or extent of pneumoconiosis. Finally, for many there is no record of the film quality. As a result, with exception of the x-ray interpretations charted above, the treatment x-ray results are not in compliance with the quality standards of §718.102 and Appendix A to Part 718, and will not be considered under § 718.202(a)(1).

May 3, 1988 – Radiology report by Dr. Halbert: Lung fields are clear, negative chest.

May 4, 1988 – PFT and ABG report by Dr. Mettu – Mild obstructive airway defect with decreased MVV; no improvement post-bronchodilator. (See chart above).

March 21, 1995 – Radiology report by Dr. Halbert: Interval improvement with decreased atelectasis in the right base. Minimal residual atelectasis present.

November 17, 1996 – X-ray report by Dr. Powell. (See chart above).

December 18, 1996 – X-ray report by Dr. Myers. (See chart above).

March 28, 1997 – CT scan report by Dr. West: No active pathology identified in the chest.

April 29, 1998 – Examination report by Dr. Obebe: Lungs show some expiratory wheezes in both lung fields and there is increase in expiratory phase. A chest x-ray was obtained and was unremarkable. Impression: COPD with exacerbation and bronchitis.

April 29, 1998 – Chest x-ray report by Dr. West: No active pathology.

May 1, 1998 – ABG report. (See chart above).

April 17, 1998 – Examination report by Dr. King: Emergency room x-ray was negative. He was admitted due to increased shortness of breath and the inability to void. Chest examination shows diffuse moderately pitched expiratory wheezes throughout all lung fields. Assessment: COPD with acute exacerbation and history of CWP.

September 5, 2001 – X-ray report by Dr. West: There is pulmonary hyperinflation with mild prominence of the central pulmonary arteries and there is some thickening of the lower fissure, which is new when compared to the 11/27/92 film, and may be chronic pleural reaction. Impression: COPD.

September 6, 2001 – Examination report by Dr. King: Chest examination shows some expiratory scattered wheezes. Assessment: CWP with acute exacerbation.

Death Certificate

The death certificate, signed by Dr. King, lists that Miner's death was due to progressive massive fibrosis and coal workers' pneumoconiosis. (DX 10).

Narrative Medical Opinion

Dr. Ben Branscomb submitted a report dated November 17, 2003. (EX1). Dr. Branscomb considered all of the evidence included in DX 1 through 27, and his own previous medical reports. As noted above, while the Director's exhibits includes a number of reports from examining and treating physicians, many of these reports exceed the limitations and cannot be

considered without a showing of “good cause.” In addition, the evidence from the living miner’s claim is not automatically admissible, and the undersigned must consider its impact on §725.414 to determine whether consideration is appropriate.⁹ Upon review of Dr. Branscomb’s report, I do not find his consideration of the non-designated evidence to be harmless. First, he considers 51 negative x-ray interpretations and five CT scan interpretation that are not designated in the instant claim, and uses this evidence to undermine Dr. King’s opinion as to the cause of death as listed on the death certificate. Second, Dr. Branscomb reviewed and summarized reports by Drs. Younes (DX 11), Dr. Broudy (DX 12), Dr. King (DX 13), and Dr. Sundaram (DX 15), all of which exceed the limitations of §725.414. He also considered Dr. Caffrey’s reports. (DX 14, 17). Dr. Branscomb’s conclusions are broad, and it is not possible for the undersigned to determine which opinions are based on admissible versus inadmissible evidence. Therefore, while I find Dr. Branscomb’s November 13, 2003 report to properly designated as one of Employer’s two medical reports, I conclude that it considers evidence in excess of the limitations which constitute more than harmless error, and thus, I find that this report may not be considered in the instant adjudication.

Dr. Branscomb submitted a supplement to his November 17th report dated November 26, 2003, in which he stated that CWP, medical or legal, did not hasten Mr. Leslie’s death. (EX 2). As Dr. Branscomb did not make mention of the evidence he considered to reach this conclusion, I assume that this was simply a supplemental opinion based on the previously considered evidence. As such, like the November 17th report, Dr. Branscomb’s November 26th report is similarly inadmissible for its consideration of evidence in excess of the limitations of §725.414.

Dr. Branscomb submitted a second supplemental report dated February 23, 2004, in which he again considered Miner’s death certificate, but also Dr. King’s questionnaire and his own November 17, 2003 medical report. (EX 3). Again, Dr. Branscomb makes reference to the “overwhelmingly negative x-rays” in support for his conclusion that there was no CWP or progressive massive fibrosis. Therefore, as with his prior submissions, I find that Dr.

⁹ The Benefits Review Board held in a recent decision interpreting the “new regs” that the medical evidence submitted in a living miner’s claim is not automatically admissible in a survivor’s claim filed after January 19, 2001. *Church v. Kentland-Elkhorn Coal Corp.*, BRB Nos. 04-0617 BLA and 04-0617 BLA-A (Apr. 8, 2005) (unpub.). In this vein, the Board stated the following:

As noted by the Director, when a living miner files a subsequent claim, all the evidence from the first miner’s claim is specifically made part of the record. *See* 20 C.F.R. § 725.309(d). Such an inclusion is not automatically available in a survivor’s claim filed pursuant to the revised regulations. As this case involves a survivor’s claim, the medical evidence from the prior living miner’s claim must have been designated as evidence by one of the parties in order for it to have been included in the record relevant to the survivor’s claim.

The Board also held that the medical evidence from the prior living miner’s claim must meet the limitations under 20 C.F.R. § 725.414 to be considered in the survivor’s claim, and that medical opinion evidence in the survivor’s claim should take into consideration only evidence that is properly admissible. The Board did rule that the Judge’s crediting of medical reports that considered medical evidence not properly admitted into the survivor’s claim was harmless error because the improperly considered medical evidence was not the basis for the medical reports’ conclusions. The Board did not rule that medical opinions that consider medical evidence not properly admitted into the survivor’s claim must be excluded. Rather, the Board held that the Judge must address the implications of § 725.414(a)(3)(i) when considering such medical opinions.

Branscomb's considerations of evidence in excess of the limitation as a basis for his conclusions renders the February 23, 2004 report inadmissible for consideration in the instant adjudication.

Dr. Raphael Caffrey, a pathologist, submitted a consultation report dated June 25, 2002, a supplemental report dated August 1, 2002, and was deposed by the Employer on August 21, 2002. (DX 17). Dr. Caffrey's June and August 2002 reports, like those of Dr. Branscomb, are primarily based on evidence that is neither designated nor admissible in the instant claim. For instance, in the July report, Dr. Caffrey contradicted the x-ray interpretations by Drs. Myers and Fritzhand with Dr. Broudy's conclusion that Miner had chronic obstructive asthma and Dr. Vuskovich's diagnosis of COPD secondary to smoking. I note that none of these reports were admissible under the limitations of §725.414. Turning to the August 2002 report, I note that Dr. Caffrey based his CWP and progressive massive fibrosis conclusions on 76 chest x-rays and 12 CT scan interpretations of record. Furthermore, Dr. Caffrey specifically noted the 40 pack-year smoking determination by Dr. Chandler as a basis for his conclusion that Claimant did not have CWP, and if he did, it was due to tobacco exposure. Again, as with the July opinion, the evidence central to Dr. Caffrey's conclusion in the August report was not admissible under the limitation of §725.414. Therefore, due to the fact Dr. Caffrey's consideration of this excessive evidence appears to be the basis for his ultimate conclusions, I find that this consideration was not harmless, and that Dr. Caffrey's July and August 2002 reports will not be considered in the instant adjudication.

Unlike the medical reports, Dr. Caffrey's deposition includes conclusions based primarily on admissible evidence in this claim, and those opinions may be considered in the instant adjudication. Dr. Caffrey notes that Dr. Powell and Dr. Myers both found Miner to suffer from simple pneumoconiosis, but on the death certificate, Dr. King diagnosed progressive massive fibrosis, or complicated pneumoconiosis, as the cause of death. (DX 17: 7-8). According to Dr. Caffrey, the record included no evidence of progressive massive fibrosis, nor any documentation by Dr. King explaining how he arrived at that diagnosis. (DX 17:7-8).

Claimant testified that Miner had been treated by Dr. King. (DX 6:6-7, 9; Tr. 11). Dr. King submitted a letter on January 15, 2004, in response to the report by Dr. Branscomb. (CX 2). He stated that Miner had a 26 year history of exposure to coal dust, and while there was a question of possible cigarette smoking, Dr. King said that he was not aware of any smoking history, but merely some exposure to secondhand smoke. Next, Dr. King noted that Miner did have gastroesophageal reflux disease, but that it was easily controlled through medication. Turning to Miner's respiratory condition, Dr. King began by reiterating that there was never a history of asthma, and he opined that based on his years treating Miner, and his personal reviews of multiple x-rays, that Miner's respiratory disease was the result of CWP, and that the findings were consistent with complicated CWP and restriction of pulmonary function due to fibrosis from exposure. Finally, Dr. King concluded that Miner's death was hastened as a result of his years of coal dust exposure resulting in CWP.

Dr. King submitted a second letter dated October 4, 2004, in which he opined that based on the medical findings from his years as Miner's treating physician and Miner's exposure to coal dust, that Miner suffered from CWP. Also, he concluded that CWP was the immediate

cause of death. (CX 1). He further stated that Miner was never diagnosed with asthma, and that he did not have GERD significant enough to cause symptoms such as aspiration chronically.

Smoking History

Claimant testified that Miner never smoked, and while she smoked a pack per day for 50 years, she never did so when around the Miner. (Tr. 11-12). While Dr. King's letter noted that there was some question as to whether Miner smoked, he also stated that he was not aware of any smoking history. Therefore, as there is no admissible evidence of record to contradict Claimant's testimony, I find that Miner has never smoked.

DISCUSSION AND APPLICABLE LAW

Mrs. Leslie filed her survivor's claim on March 4, 2002. (DX 3). Entitlement to benefits must be established under the regulatory criteria at Part 718. *See Neeley v. Director, OWCP*, 11 B.L.R. 1-85 (1988). The Act provides that benefits are provided to eligible survivors of a miner whose death was due to pneumoconiosis. § 718.205(a). In order to receive benefits, the claimant must prove that:

- 1). The miner had pneumoconiosis;
- 2). The miner's pneumoconiosis arose out of coal mine employment; and
- 3). The miner's death was due to pneumoconiosis.

§§ 718.205(a). Failure to establish any of these elements by a preponderance of the evidence precludes entitlement. *See Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 B.L.R. 1-26, 1-27 (1987).

Pneumoconiosis

In establishing entitlement to benefits, Claimant must initially prove the existence of pneumoconiosis under § 718.202. Claimant has the burden of proving the existence of pneumoconiosis, as well as every element of entitlement, by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). Pneumoconiosis is defined by the regulations:

For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis.

(1) *Clinical Pneumoconiosis*. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that

deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) *Legal Pneumoconiosis*. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

Section 718.201(a).

Section 718.202(a) sets forth four methods for determining the existence of pneumoconiosis.

(1) Under § 718.202(a)(1), a finding that pneumoconiosis exists may be based upon x-ray evidence. In this claim the record contains two interpretations of two chest x-rays. Dr. Powell, a B-reader, interpreted the November 1, 1996 film as positive for pneumoconiosis. Dr. Myers interpreted the December 2, 1996 film as positive for pneumoconiosis. There were no negative readings of either film. Therefore, I find that both of these x-rays are positive for pneumoconiosis. As a result, I find that the November 1, 1996 and December 2, 1996 chest x-rays are positive for the presence of pneumoconiosis. Therefore, I find that Claimant has established the presence of pneumoconiosis under subsection (a)(1).

Claimant has established the presence of pneumoconiosis under subsection (a)(1). Therefore, I find that Claimant has established the presence of pneumoconiosis under §718.202 (a).

Arising out of Coal Mine Employment

In order to be eligible for benefits under the Act, Claimant must prove that pneumoconiosis arose, at least in part, out of his coal mine employment. § 718.203(a). For a miner who suffers from pneumoconiosis and was employed for ten or more years in one or more coal mines, it is presumed that his pneumoconiosis arose out of his coal mine employment. *Id.* As I have found that Claimant has established at least 26 years of coal mine employment, I find that Claimant's pneumoconiosis arose out of his coal mine employment in accordance with the rebuttable presumption set forth in § 718.203(b), to which no contrary evidence was offered by the Employer.

Death Due to Pneumoconiosis

Having established that Miner suffered from pneumoconiosis arising out of coal mine employment, Mrs. Leslie is now required to prove that Miner's death was due to pneumoconiosis in order to be entitled to benefits. Subsection 718.205(c) applies to survivor's claims filed on or after January 1, 1982 and provides that an eligible survivor will be entitled to benefits if any of the following criteria are met:

1. Where competent medical evidence establishes that pneumoconiosis was the cause of the Miner's death, or
2. Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where death was caused by complications of pneumoconiosis, or
3. Where the presumption set forth in § 718.304 (evidence of complicated pneumoconiosis) is applicable.

20 C.F.R. § 718.205(c).

Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. § 718.205(c)(5).

A death certificate, in and of itself, is an unreliable report of the miner's condition and it is error for an administrative law judge to accept conclusions contained in such a certificate where the record provides no indication that the individual signing the death certificate possessed any relevant qualifications or personal knowledge of the miner from which to assess the cause of death. *Smith v. Camco Mining, Inc.*, 13 B.L.R. 1-17 (1989); *Addison v. Director, OWCP*, 11 B.L.R. 1-68 (1988). Also, a physician's report may be rejected where the basis for the physician's opinion cannot be determined. *Cosaltar v. Mathies Coal Co.*, 6 B.L.R. 1-1182 (1984). Furthermore, an unsupported medical conclusion is not a reasoned diagnosis. *Fuller v. Gibraltar Corp.*, 6 B.L.R. 1-292 (1984). See also *Phillips v. Director, OWCP*, 768 F.2d (8th Cir. 1985); *Smith v. Eastern Coal Co.*, 6 B.L.R. 1-1130 (1984); *Duke v. Director, OWCP*, 6 B.L.R. 1-673 (1983)(a report is properly discredited where the physician does not explain how underlying documentation supports his or her diagnosis); *Waxman v. Pittsburgh & Midway Coal Co.*, 4 B.L.R. 1-601 (1982).

Looking to the medical conclusions in this claim for benefits, I am faced with a situation where the majority of the evidence has been excluded, either for failure to properly designate within the limitations, or due to the fact that properly designated reports considered substantial amounts of evidence that would have exceeded the limitations. The limitations are not optional. See, e.g., *Smith v. Martin County Coal Corp.*, 23 B.L.R. 1-__, BRB No. 04-0126 BLA (Oct. 27, 2004) ("the parties must present their evidence as delineated in Section 725.414"); *Gilbert v. Consolidation Coal Co.*, BRB Nos. 04-0672 BLA and 04-0672 BLA-A (May 31, 2005) (*unpub.*) (holding that the evidentiary limitations set forth at §725.414 are mandatory and, absent a finding of "good cause," it was proper for the ALJ to exclude the deposition testimony offered by Employer of Claimant's treating physician). And while the undersigned is receptive to "good cause" arguments for inclusion of reports, when merited, I am not inclined to make the exception the rule without a showing by the parties.

Complicated Pneumoconiosis

The death certificate signed by Dr. King notes that Claimant's death was due to progressive massive fibrosis and CWP. Furthermore, Dr. Caffrey's deposition explained that

progressive massive fibrosis is complicated pneumoconiosis. Dr. King's subsequent letter stated that based on his lengthy treatment of Miner and personal reviews of multiple x-rays, that the findings were consistent with complicated CWP.

I find that Dr. King's diagnosis of progressive massive fibrosis is neither reasoned nor supported by the evidentiary record. First, Dr. King does not note which x-ray evidence he considered in reaching his finding of complicated pneumoconiosis, and as pointed out by Dr. Caffrey, all of the admissible x-ray interpretations in this claim show only category one pneumoconiosis. Second, while Dr. King stated that he relied on his treatment history of Miner to find complicated pneumoconiosis, a review of the treatment record includes no discussion or diagnosis of complicated pneumoconiosis. Therefore, I find that despite the death certificate diagnosis, and Dr. King's status as Miner's treating physician, his diagnosis of complicated pneumoconiosis is not supported by the evidence of record, and is thus, unreasoned. As a result, the irrebuttable presumption set forth in § 718.304 – that a miner's death was due to pneumoconiosis if the medical evidence met the criteria for or established complicated pneumoconiosis – is not applicable because Claimant has not established by a preponderance of the evidence the presence of complicated pneumoconiosis.

Direct Cause or Hastened Miner's Death

The only admissible evidence in this claim concerning the cause of Miner's death are the death certificate and the two letters from Dr. King. In the January 2004 letter, Dr. King concluded that Mr. Leslie's death was hastened by his years of coal dust exposure resulting in CWP. Likewise, Dr. King's October 2004 letter opines that CWP was the immediate cause of Miner death. I note that in neither report does Dr. King explain how CWP caused or hastened Miner's death, but instead, simply offered an unsupported medical conclusion. As a result, I find Dr. King's opinions that Claimant's death was due to CWP to be unreasoned and unsupported by the medical evidence of record. Therefore, I find that Claimant has failed established that Miner's death was due to pneumoconiosis under § 718.205(c).

Entitlement

Dixie Leslie has proven, by a preponderance of the evidence, that Billie Leslie suffered from pneumoconiosis arising out of coal mine employment, but has failed to prove by a preponderance of the evidence that his death was due to pneumoconiosis. Therefore, I find that Mrs. Leslie is not entitled to benefits under the Act.

Attorney's Fees

An award of attorney's fees is permitted only in cases in which the claimant is found to be entitled to benefits under the Act. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for the representation and services rendered in pursuit of the claim.

ORDER

IT IS ORDERED that the claim of Dixie Leslie for benefits under the Act is hereby DENIED.

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THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Donald S. Shire, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).